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Human Rights Committee

Communication No. 1937/2010

Views adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	Mansour Leghaei and others (represented by Joanne Kinslor)
Alleged victims:	The author, his wife and four children
State party:	Australia
Date of communication:	16 April 2010 (initial submission)
Document references:	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 21 April 2010 (issued in document form)
Date of adoption of Views:	26 March 2015
Subject matter:	Expulsion to the Islamic Republic of Iran
Procedural issues:	Insufficient substantiation; non-exhaustion of domestic remedies
Substantive issues:	Compelling reasons of national security; review of expulsion; discrimination on the ground of national origin; discrimination on the ground of other status; arbitrary interference with family life; best interest of the child.
Articles of the Covenant:	2; 13; 17; 23; 24; 26
Articles of the Optional Protocol:	2; 5 (para. 2 (b))

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 1937/2010*

Submitted by:	Mansour Leghaei and others (represented by Joanne Kinslor)
Alleged victims:	The author, his wife and children
State party:	Australia
Date of communication:	16 April 2010 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2015,

Having concluded its consideration of communication No. 1937/2010, submitted to the Human Rights Committee by Mansour Leghaei, his wife and children, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1.1 The author is Mansour Leghaei, an Iranian citizen born on 19 May 1962. He claims that the decision to deny him a permanent visa to remain in Australia makes him liable to removal from Australia to the Islamic Republic of Iran, in breach of a number of his rights as well as the rights of his wife and children under articles 2, 13, 17, 23, 24 and 26 of the Covenant. His wife is Marzieh Tabatabaei Hosseini (born on 28 August 1964) and their children are Mohammad Reza Laghaei and Mohammad Sadegh Laghaei (born on 20 September 1983, and both Australian citizens since 2003), Mohammad Ali Leghaei (an Iranian citizen, born on 12 July 1989) and Fatima Leghaei (an Australian citizen, born in Australia on 10 December 1995). The authors are represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.
The text of an individual opinion by Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia is appended to the present Views.

1.2 On 21 April 2010, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, requested the State party not to expel the author and his accompanying dependents to the Islamic Republic of Iran while their communication was under consideration by the Committee. On 15 June 2010, upon receipt of further information from both parties (see paras. 4.1–4.2 and 5.1–5.2 below), the request to grant interim measures was lifted.[1] The author left with his wife and minor daughter on 27 June 2010.

The facts as submitted by the author

2.1 The author first came to Australia in 1994 on a subclass 672 short-stay business visa, to be employed as a halal meat supervisor. In 1995 he was granted a subclass 428 religious worker visa, which allowed him to work as a Muslim religious leader (sheikh) and to enter and leave Australia. Each of these visas was a temporary visa. On 1 November 1996, the author applied for a permanent visa. The author's wife and children were included in the application as his dependants.

2.2 By a decision dated 25 August 1997, a delegate of the then Minister for Immigration refused to grant the visas, on the basis that he had been assessed by the Australian Security Intelligence Organisation as being a threat to national security.[2] The reason why the author was considered to be a risk to national security was not explained.

2.3 On 17 October 1997, the delegate's decision was affirmed by the Migration Internal Review Office of the Department of Immigration and Multicultural Affairs. Again, the decision did not mention why he was considered a security threat.

Administrative review proceedings against the decision to refuse the permanent visa

2.4 On 7 November 1997, the author applied to the Immigration Review Tribunal (now called the Migration Review Tribunal) for a review of the decision to refuse his visa.[3] The review was suspended pending the outcome of the author's Federal Court proceedings against the Australian Security Intelligence Organisation assessment (see below).

Australian Security Intelligence Organisation assessment of 2002

2.5 In October 1999, the Department of Immigration and Multicultural Affairs made a request to the Australian Security Intelligence Organisation for advice as to whether it still considered the author to be a risk to national security. On 13 March 2002, the Australian Security Intelligence Organisation stated that its assessment of the author was that he continued to be a direct risk to national security. The author learned of that assessment in a letter to his legal representatives sent by the Australian Government Solicitor (representing the Minister for Immigration and the Director General of Security), dated 29 July 2002, in the context of judicial proceedings. On 14 March 2002, the Minister for Immigration issued a "conclusive certificate" under the Migration Act, which the Minister is entitled to issue if he believes that it would be contrary to the national interest to change the decision under review, or for the decision to be reviewed. On 17 April 2002, the Migration Review Tribunal advised the author that it had ceased its review of the decision, and enclosed a copy of the conclusive certificate. On 29 April 2002, a further conclusive certificate was issued by the Minister.

[1] See paras. 4, 5.1 and 5.2 below.

[2] The author was unable to satisfy Public Interest Criterion 4002 in schedule 4 to the Migration Regulations 1994.

[3] On 1 June 1999, the "Immigration Review Tribunal" was renamed the "Migration Review Tribunal".

First proceedings before the Federal Court (application 21/2002)

2.6 On 10 May 2002, the author commenced proceedings in the Federal Court against the Minister for Immigration and against the Director General of Security (representing the Australian Security Intelligence Organisation), seeking to set aside the Minister's decision to issue the conclusive certificates, and the March 2002 security assessment by the Australian Security Intelligence Organisation. Among other things, the author claimed that the March 2002 assessment was void because procedural fairness had not been accorded to him. During the proceedings, the Australian Government Solicitor informed the author's counsel that the Australian Security Intelligence Organisation had re-examined the information on which the March 2002 security assessment had been based. The Australian Security Intelligence Organisation noted that, among the information, there were two documents that it claimed it had obtained from the author's suitcase without his knowledge while he had been in transit at Sydney Airport. The first document was a handwritten notebook in the Persian language which, according to the author, the Australian Security Intelligence Organisation "erroneously claims discussed how to fight a jihad". The second document was the translation of an alleged e-mail dated 23 September 1995 from the author to the Organization of Culture and Islamic Relations regarding a sum of 4,000 Australian dollars borrowed from friends, which he was trying to recover through the Iranian Ambassador in Australia so as to reimburse the organization. The Australian Security Intelligence Organisation's translation of the notebook was conceded at the Federal Court of Australia to be flawed, and as such, the Australian Security Intelligence Organisation was ordered by the Court to pay the author one third of the legal costs. Concerning the e-mail, the Australian Security Intelligence Organisation stated in court that it did not have a copy of the alleged Persian-language document but merely possessed its own English language translation of it, which dated back seven years. In light of subsequent Federal Court proceedings that were based on a further security assessment issued in 2004, replacing the 2002 assessment, the Federal Court terminated the proceedings by a judgement dated 22 July 2004 (regarding application No. 21/2002).[4]

2.7 The Australian Security Intelligence Organisation undertook a fresh security assessment, which was notified to the author on 26 May 2004, with a request to him to comment on that assessment. However, he was not provided with a copy of the assessment, nor any direct information about the content of it.

Second proceedings before the Federal Court

2.8 On 21 July 2004, the author commenced new proceedings in the Federal Court seeking an injunction to, inter alia, restrain the Australian Security Intelligence Organisation from furnishing the fresh assessment to the Department of Immigration and Multicultural and Indigenous Affairs and declare that the fresh assessment was void and inoperative. By a decision dated 10 November 2005, the Federal Court, sitting in a single-judge formation, dismissed the proceedings in a written decision which excluded confidential parts.

2.9 The Federal Court found that: (a) applicable legislation provides that an Australian citizen (or permanent resident) who is the subject of an adverse security assessment is ordinarily entitled to notification of that fact and to a statement of reasons; (b) the policy is that non-citizens who do not hold permanent residency visas (such as the author) will not have access to a right of review, nor to the procedural fairness requirements at the review level; (c) non-citizens have no right to receive a statement of reasons for a security assessment, nor indeed any statutory right to be notified of an assessment; (d) in relation to

[4] See para. 6.4 below.

a lawful non-citizen, such as the author, whose visa would be directly threatened by an adverse security assessment, there is a duty to afford "such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security"; (e) the Court is not in a position to form a contrary view on the opinion apparently expressed in confidential affidavit evidence (which was not provided to the author), since "courts are ill-equipped to evaluate intelligence";[5] and (f) in consequence, the obligation to provide the degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security, will be "discharged by evidence of the fact and content of such genuine consideration by the Director General personally". The Court also found that Parliament had determined, in effect, that the Director General must be trusted to be fair to those against whom a security assessment had been made and concluded that "genuine consideration has been given, by the Director General, to the possibility of disclosure, but that the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness... The applicant was accorded procedural fairness to the extent that the interests of national security permitted."

2.10 On 18 January 2006, the author appealed to the Full Federal Court. On 23 March 2007, the Court dismissed the appeal. The complete judgement is not publicly available, as portions of it were ordered by the Court to remain confidential. However, the Court accepted previous authority to the effect that the balancing of the conflicting principles of entitlement of a person to know the adverse case, and national security, may in some cases produce "the 'unsatisfactory' feature that the content of a security assessment is withheld from the person affected". It also found that there was no error in the primary judge's reasons. On 28 May 2007, the author applied for special leave to appeal to the High Court. The application was refused on 8 November 2007. The refusal of that application allowed the Migration Review Tribunal to proceed with its review of the refusal to grant the applicants a permanent visa.

Restarting of the procedure before the Migration Review Tribunal

2.11 On 2 October 2009, the Migration Review Tribunal wrote to the author in relation to his application for a review of the decision to refuse him a permanent visa, inviting him to comment by 30 October 2009 on the fact that the Australian Security Intelligence Organisation had made a security assessment. On 7 October 2009, the author responded by asking the Tribunal which assessment he should comment on, and requested a copy of all assessments by the Australian Security Intelligence Organisation relating to him. He also sought an extension of the time to comment. The Tribunal responded that it was inviting comment on the assessment dated 25 May 2004 and that it did not have a copy of that assessment. It granted the author an extension of time. On 19 November 2009, the author provided a detailed submission, noting that neither he nor the Tribunal had a copy of the Australian Security Intelligence Organisation assessment in question, nor did he know anything of its content or the evidence upon which it was based. He argued that, in making the security assessment, the Australian Security Intelligence Organisation had made a mistake. He submitted that the Tribunal should place little weight on the assessment, on the basis that the Australian Security Intelligence Organisation had not provided reasons for the

[5] The exact wording of Court is: "Mindful in a general way of Lord Hoffman's remarks, but without the benefit of countervailing expert evidence in the present case, I am not in a position to form an opinion contrary to those expressed in the confidential affidavit evidence in relation to disclosure. I reiterate the general point made by Wilson, Dawson and Brennan JJ in Alister (above) that courts are ill-equipped to evaluate intelligence." See *Leghaei* v. *Director General of Security* [2005] Federal Court of Australia 1576, para. 84.

assessment to the Tribunal to enable it to properly assess its validity. He remarked that he had been living in Australia with his family for 16 years and had been an active and respected member of the Australian community. He referred to his role as a director and cleric of the Imam Husain Islamic Centre. With his response, the author submitted a copy of the transcript of an interview conducted with him by Australian Security Intelligence Organisation officers in 1999 and a statutory declaration that he had made on 24 March 2004, giving details about his activities in Australia.

2.12 On 19 February 2010, the Tribunal affirmed the original decision not to grant a visa to the author and his remaining two dependants. In its findings, it stated that "while the Tribunal is sympathetic to the primary applicant's predicament, it does not have the power to go behind or to examine the validity of the Australian Security Intelligence Organisation assessment". The author then requested the Minister for Immigration to exercise his personal, non-compellable, non-reviewable discretionary power, under section 351 of the Migration Act, to substitute a more favourable decision and to allow him and his two remaining dependants to remain in Australia.

2.13 On 19 May 2010, the author added that on 17 May 2010 he had been notified that the Minister had decided not to accede to his request for ministerial intervention. However, the Minister had decided to grant his wife and non-Australian son visas for permanent residency in Australia. The decision not to intervene in the author's favour is not subject to appeal. Domestic remedies have therefore been exhausted.

The complaint

3.1 The author claims that his deportation to the Islamic Republic of Iran would constitute a violation of articles 2, 13, 17, 23, 24 and 26 of the Covenant.

3.2 With regard to article 13, the State party has allegedly violated its obligation to provide the author with a fair hearing in accordance with law and pursuant to the procedural guarantees (including equality of arms) of article 13 by deciding that he was a direct risk to national security for the purpose of determining his immigration status. Firstly, he was provided with only a bare assertion that he was a national security risk and was given no further details of the case against him, and was thus unable to adequately contest the evidence. Secondly, all proceedings were purely formal and could not provide a review of the merits of the decisions leading to his removal.

3.3 More specifically, he claims that: (a) he was never provided with a copy of the 2004 security assessment by the Australian Security Intelligence Organisation upon which the decision to refuse his visa was based, or at least a redacted summary of the case against him, nor with adequate or detailed reasons for the adverse security assessment; (b) he was never provided with access to any of the evidence upon which the adverse security assessment was based; (c) he was never notified of the existence of any witnesses upon whose testimony the security assessment was based, or given any opportunity to challenge witnesses; (d) he was unable to explain or challenge the evidence against him, because he was unaware of the particulars of the evidence; (e) he has, therefore, not been able to consider whether the evidence was reliable or was obtained illegally or improperly; (f) his legal representatives were "security cleared" and shown some limited confidential information, which they were given a very limited amount of time to read and were not able to make notes on; and (g) he was not permitted to be informed of the form let alone the substantive content of confidential evidence provided to his legal representatives, since the granting of security clearance to his lawyers, in order for them to access that evidence, was on a confidential basis. Accordingly, he was unable to instruct his legal representatives in their dealings with that evidence, including in connection with challenges to its reliability, alternative explanations for any assertions alleged against him, or requests for further particulars. Even if the author's legal representatives had seen substantive evidence (which

the State party has not demonstrated), that alone would not have been sufficient to provide the author with a fair hearing, given that the author could not properly instruct his representatives; (h) the Migration Review Tribunal "did not have the power to go behind or assess the validity of the Australian Security Intelligence Organisation assessment" (19 February 2010). Thus, the administrative "merits" review tribunal was unable to independently test the merits of the evidence; and (i) the Federal Court was similarly unable to review the evidence, because its power was limited to judicial review of questions of law and it could not review the merits. Substantial portions of the Federal Court's and the Full Court of the Federal Court's reasons (at first instance and on review) remain confidential, seriously undermining confidence in the fairness of the process.

3.4 While immigration or deportation proceedings are not suits at law under article 14 of the Covenant, article 13 nonetheless implicitly incorporates the more extensive fair hearing protections provided for under article 14, as stated in the Committee's general comment No. 32 (2007) on article 14 of the Covenant (on the right to equality before courts and tribunals and to a fair trial). The author therefore contends that article 13 takes the guarantee of equality from article 14 (para. 1), including the principles of impartiality, fairness and equality of arms implicit in that guarantee. It demands that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.[6]

3.5 With regard to article 2 (para. 1) read in conjunction with article 13, as well as to article 26, the author was denied procedural fairness, on account of his status as a non-Australian citizen or non-permanent resident. Section 38 of the Australian Security Intelligence Organisation Act requires that an adverse security assessment be furnished to the person affected within 14 days, unless the Attorney General is satisfied that withholding notice of the assessment is essential to the security of the nation or that disclosure of the grounds of the assessment would be prejudicial to the interests of security. However section 36 of the Australian Security Intelligence Organisation Act provides that this form of procedural fairness does not apply to non-Australian citizens or non-permanent residents.

3.6 As far as articles 17, 23 and 24 are concerned, the legal consequence of the refusal of the author's visa is his deportation to the Islamic Republic of Iran, which would have the practical effect of separating him from his family and his community in Australia.[7]

3.7 Unless the State party provides the author with a fair hearing, it cannot demonstrate that his deportation is not arbitrary. In the absence of reasons or evidence, there can be no confidence that the decision and its consequent interference with family life are not arbitrary. As a remedy, the State party should afford the author a fair hearing before it takes any decision to refuse him permanent residency which compels him to leave Australia. The hearing should include the provision of sufficiently specific information as to the allegations against the author that he is a national security risk, and an opportunity for him to contest or explain those allegations.

[6] Human Rights Committee general comment No. 32, para. 13. The author also refers to the jurisprudence of the Committee, including communication No. 846/1999, *Jansen-Gielen* v. *the Netherlands*, Views adopted on 3 April 2001, para. 8.2; and communication No. 779/1997, *Äärelä and Näkkäläjärvi* v. *Finland*, Views adopted on 24 October 2001, para. 7.4.

[7] As mentioned in para. 2.13 above, by a letter dated 19 May 2010, the author informed the Committee that the Minister's decision not to intervene concerned only him. By ministerial intervention, his wife and his children without Australian citizenship were offered the possibility to stay in Australia through the granting of a permanent residency visa.

The State party's request to lift interim measures and the author's reply

4. On 4 June 2010, the State party considered that, on the basis of the Minister's decision to intervene in the cases of the author's wife and younger son, interim measures were no longer necessary since the circumstances had changed. Moreover, it did not appear that irreparable harm would be caused as a result of the author's removal, since the separation of the author from his family was not permanent or irreversible as members of the family were not impaired from visiting the author or from residing with him in the Islamic Republic of Iran.

5.1 On 8 June 2010, the author's counsel replied that his removal would break up a close Muslim family unit. Such a result would be traumatic for all concerned. With regard to the State party's argument that the family could visit the author in the Islamic Republic of Iran, such a contention is unrealistic given the excessive cost of return flights for an entire family. Even if those insurmountable financial impediments did not exist, ordinary life could not continue in such transitory circumstances.

5.2 Concerning the State party's contention that his family could live with him in the Islamic Republic of Iran, the author argues that his minor daughter is Australian-born, an Australian citizen, and illiterate in the Persian language. Removing her to the Islamic Republic of Iran in the middle of her teenage years would be extremely disruptive to her development, interfering with her schooling, separating her from her friends and removing her to a foreign country where she could not communicate fluently.

State party's observations on admissibility and the merits

6.1 On 3 February 2011, the State party submitted its observations on admissibility and the merits. Following the Minister's decision not to intervene in favour of the author but to intervene in favour of his wife and his non-Australian son, the author was granted a series of bridging visas to maintain his lawful status in the community until his departure. On 27 June 2010, the author departed Australia, accompanied by his wife and their minor daughter. The latter, as an Australian citizen, can return to Australia at any time. The author's wife has the right to return to Australia, as the holder of a permanent visa, but would have to return within the five-year validity period of her visa. The State party therefore addresses the allegations in the communication in the light of these changed factual circumstances.

6.2 On 10 May 2002, the author commenced proceedings against the Australian Security Intelligence Organisation in the Federal Court of Australia (application No. 21/2002).

6.3 While the first proceedings were still ongoing before the Federal Court, on 25 May 2004, the Department of Immigration and Multicultural and Indigenous Affairs was advised by the Australian Security Intelligence Organisation that the latter had issued a further security assessment in relation to the author's suitability to hold a permanent visa. That assessment took into account, among other things, legal advice in relation to procedural fairness and additional information provided by the author. The author was advised of the new security assessment.

6.4 The author decided to institute new proceedings in relation to the 2004 security assessment, on 21 July 2004 (application No. 21/2004). On 22 July 2004, as a consequence of the new proceedings being instituted, the Federal Court, sitting in a single-judge formation, decided to terminate the first court proceedings.

6.5 On 10 November 2005, the Federal Court, sitting in a single-judge formation, delivered its judgement in respect of the second proceedings (application No. 21/2004).[8] In relation to the procedural fairness claims, the judge considered that, despite there being no statutory right for persons in the author's position to be notified of a security assessment, procedural fairness still applied under the common law. However, the judge accepted that procedural fairness did not require the disclosure of confidential information if to do so would harm the public interest on national security grounds. The judge therefore considered that, in principle, for lawful non-citizens such as the author, whose visa would be directly threatened by an adverse security assessment, there was a duty to afford such degree of procedural fairness, provided there was no prejudice to national security. The judge then continued to consider whether, in the present case, that duty was discharged. During the proceedings, the Director General of Security of the Australian Security Intelligence Organisation had provided confidential evidence to the Court on the reasons why it was not possible to disclose any part or summary of the grounds to the author without undue prejudice to national security, although the author was aware in a general sense of the security concerns about him.[9] The Court was provided with information about the grounds relied upon by the Australian Security Intelligence Organisation to make its 2004 assessment. Information about the grounds was also provided to the author's legal representatives, although the author himself was unable to see this, pursuant to the Australian Security Intelligence Organisation Act and the orders of the Court.[10]

6.6 Although the judge had access to the confidential evidence mentioned above, he commented that courts were not well equipped to evaluate intelligence. However, he stated that, in the present circumstances, and in view of the evidence presented before the Court, the obligation to afford such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security, would be discharged. The judge added that if he found expert opinion that the task had not been adequately undertaken, consideration would have to be given to that issue de novo by the Court. The judge argued that a court must not uncritically take the Director General's reasoning for any disclosure entirely at face value but that recognition and respect must also be given to the degree of expertise and responsibility held by relevant senior personnel of the Australian Security Intelligence Organisation in relation both to the potential repercussions of disclosure and to the "usual lack of such expertise on the part of judges" and that a "degree of faith must be reposed in the integrity and sense of fair play of the Director General".[11]

6.7 On 23 March 2007, the Full Court dismissed the appeal, on the ground that the judge of the Federal Court was plainly right to strike the balance in favour of protection of the public interest in national security due to the unchallengeable evidence presented by the Director General of Security. The Full Court also considered that the judge had correctly noted that, in the absence of the benefit of countervailing expert evidence, he was not in a position to form an opinion contrary to that of the Director General of Security. The Full Court was also satisfied that the Director General had given genuine consideration to the question of what disclosure could be made in the national interest.[12]

6.8 It is clear from the public judgements that both the courts and the author's legal representatives had access to evidence detailing the allegations against the author. For

[8] For the full judgement, see *Leghaei* v. *Director General of Security* [2005] Federal Court of Australia 1576.

[9] The author denies such contention.

[10] According to the State party, confidential evidence before the Court is subject to confidentiality orders and cannot be released.

[11] See *Leghaei* v. *Director General of Security* [2005] Federal Court of Australia 1576, paras. 86 and 87.

[12] See *Leghaei* v. *Director General of Security* [2007] Federal Court of Australia Full Court 37.

instance, in the judgement of 10 November 2005, the judge states that the author's legal representatives, of their own volition, after giving appropriate undertakings with regard to confidentiality, underwent a process of obtaining a security clearance, in order that they might obtain, in accordance with the judge's consent, access to the confidential material put before the court.[13]

6.9 The State party considers that article 13, which is directly applicable to the present case, has been complied with. The decision to expel the author was reached in accordance with Australian laws, namely the Migration Act and the Australian Security Intelligence Organisation Act. These laws are fully in conformity with the Covenant and were interpreted in good faith by the competent domestic authorities. The lawfulness of the decisions made under these regimes has been reviewed by Australian courts pursuant to these same laws.

6.10 In relation to the author's suggestion that a merits review is required under article 13, consideration of the Committee's own jurisprudence demonstrates that there is no requirement for an independent merits review of national security decisions in order for national security decisions to be made in accordance with the law pursuant to article 13. In fact, the Committee has found that judicial review of the "reasonableness" of security proceedings (which is a review of the lawfulness and not of the merits), where information was withheld from the complainant, has been sufficient to meet the requirements of article 13.[14] The only requirement is that such decisions are made in accordance with the substantive and procedural domestic law of the State (in the absence of bad faith or abuse of power) and that those laws are not themselves inconsistent with other applicable rights under the Covenant. A merits review of security assessment proceedings in the author's case is not required under Australian domestic law and the author does not explicitly assert that a merits review is required under any provisions of the Covenant applicable to the author's case. The State party therefore challenges the author's arguments concerning the correct interpretation of "in accordance with law" under article 13.

6.11 While not disagreeing with the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, where it has stated that the procedural guarantees of article 13 incorporate notions of due process also reflected in article 14, the State party considers that such procedural entitlements apply to the extent that "compelling reasons of national security" do not exclude them in a particular case. There is no minimum requirement in terms of procedural fairness rights provided under the second limb of article 13. This can only be determined on a case-by-case basis, to the extent that procedural fairness rights are not precluded by compelling reasons of security in the particular circumstances of each case. As stated in the Committee's jurisprudence in *Alzery* v. *Sweden*, the State party has very wide discretion in the assessment of whether a case presents national security considerations bringing the exception contained in article 13.[15] The State party therefore considers that its assertion that compelling reasons of national security arise should only be questioned by the Committee where the Committee has reason to doubt that a matter was properly one that fell within the ordinary meaning of "national security" or where it appears that a person has been denied procedural protections provided for in article 13 to a greater extent than is actually required by "compelling reasons of national security".

[13] See *Leghaei* v. *Director General of Security* [2005] Federal Court of Australia 1576, para. 101.

[14] See communication No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004.

[15] See communication No. 1416/2005, *Alzery* v. *Sweden*, Views adopted on 25 October 2006, para. 11.10. See also communication No. 236/1987, *V.M.R.B.* v. *Canada*, Views adopted on 18 July 1988, para. 6.3.

6.12 Despite the fact that compelling reasons of national security apply in the present case, the author was provided with opportunities to make submissions against the 2004 security assessment. He (or his legal representatives) also had opportunities to make submissions against the validity of the security assessment in the various legal proceedings before the courts, including submissions on the definition of "security", and in relation to whether the author's acts and conduct met essential requirements of being "acts of foreign interference". The author also had the opportunity to make submissions against his expulsion to the Minister for Immigration and to request the Minister's intervention. As far as domestic proceedings are concerned, the State party notes that all courts/judges reviewed the necessity to disclose information related to the author's case. As mentioned by the Federal Court sitting in a single-judge formation, it was not possible to put even a summary of the case against the author without compromising the interests of national security.[16] The author was given the possibility of having his case reviewed and was represented by legal representatives. He was therefore provided with relevant procedural protections under article 13 to the extent that circumstances of national security did not preclude them. There is no reason for the Committee to consider that the State party has acted in bad faith or has abused its power.

6.13 The State party considers the author's allegations under articles 2 and 26 to be unsubstantiated as there is no evidence that a distinction has been made on the basis that the author is of Iranian national origin. The State party also submits that those allegations are inadmissible, for failure to exhaust domestic remedies. Section 10 of the Racial Discrimination Act allows a complaint to be brought to the Federal Court in the first instance where persons of a particular national origin do not enjoy a right that is enjoyed by persons of another national origin, or enjoy a right to a more limited extent than persons of another national origin. It was open to the author to file such action, and if the Court accepted his argument, it would be open to the Court to allow the same entitlements to the author as those which, under the Australian Security Intelligence Organisation Act, are applicable to citizens, permanent residents and special category or special purpose visa holders. The author has made no effort for that purpose.

6.14 On the merits, the State party stresses, in accordance with the jurisprudence of the Committee, that article 2 cannot be invoked on its own. As for article 26, not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the Covenant. In the present case, the courts found that procedural fairness applied under the common law to the extent that the circumstances could bear, provided that there was no prejudice to national security. This is very similar to the procedural fairness protection that is available to citizens, permanent residents and special category or special purpose visa holders under the Australian Security Intelligence Organisation Act.

6.15 The only relevant distinction in treatment which applies under the Australian Security Intelligence Organisation Act between the author and Australian citizens and the other categories mentioned above concerns the ability of the latter categories of persons to seek a merits review of an adverse security assessment at the Administrative Appeals Tribunal. Since article 2 of the Covenant cannot be invoked alone, it is automatically related to the recognition of a violation of article 13 in the present case. The State party considers that article 13, which in any case is only applicable to aliens and can therefore not entail any differential treatment between aliens and citizens, has not been breached in the present case. The State party further considers that a merits review does not fall within the procedural fairness protections provided for in article 13.

[16] *Leghaei* v. *Director General of Security* [2005] Federal Court of Australia 1576, para. 86.

6.16 The State party denies discrimination based on other status, that is, for belonging to a class of persons defined by their non-citizen, non-permanent residency or for being a temporary migrant. This group is particularly varied, as it includes those on tourist visas, and people who reside inside or outside Australia who have no existing right of residence or any kind of visa to enter or remain in Australia. This category is insufficiently identifiably distinct as a category of persons and should not be considered by the Committee to constitute an "other status" for the purposes of the Covenant.

6.17 With regard to article 17, in the present case there is no interference because the decision as to whether the family members would accompany the author to the Islamic Republic of Iran or would remain in Australia is purely an issue for the family and the separation of the family members is not compelled by the State's action. The State party acknowledges the Committee's jurisprudence, in which it has considered that where "substantial changes to long-settled family life would follow", a decision to deport one or more members of the family will constitute "interference with the family".[17] However, it does not agree with such conclusion and thereby refers to the dissenting opinion of four Committee members in this jurisprudence.[18]

6.18 Even if the Committee considers that there has been interference, such interference would not be unlawful or arbitrary. In its jurisprudence, the Committee has considered article 17 to have been violated if, in the circumstances of the case, the separation of the author from his family and its effect on him were disproportionate to the objectives of the removal.[19] The Committee has also stated that the relevant criteria for assessing arbitrariness is the balance between the significance of the State party's reasons for the removal and the degree of hardship that the family and its members would suffer as a consequence of such removal.[20] The State party considers that an assessment that the author represents a threat to national security is a highly serious ground for requesting the departure of the author. Although the State party recognizes the hardship provoked by this decision, it tried to minimize it by granting permanent visas to the author's wife and non-Australian son. Family rights, including the best interest of the child, have been duly considered by the domestic authorities.

6.19 This decision is not unlawful since the author's security assessment and subsequent migration proceedings were made in full accordance with the law.

6.20 For the same reasons as above (in para. 6.19), the State party considers that there has been no violation of article 23 of the Covenant.

6.21 Article 24 (para. 1) does not define what protective measures are required by a child's status as a minor. The State party has a wide range of legislative and other measures to ensure that children are protected by their families, society and the State. The best interest of the author's 14-year-old daughter was taken into consideration by the Minister in making a decision to intervene in the case of the author's family. In the author's case, the existence of a security assessment was also an entirely legitimate and primary consideration for the Minister to take into account in making the decision. The Minister's decision to grant the author's wife and his non-Australian son a permanent visa ensured that the author's 14-year-old daughter was able to remain under the care of her mother and with her

[17] See communication No. 930/2000, *Winata* v. *Australia*, Views adopted on 26 July 2001, para. 7.2; and communication No. 1011/2001, *Madafferi* v. *Australia*, Views adopted on 26 July 2004, para. 9.8.

[18] Dissenting opinion to communication No. 930/2000 by Bhagwati, Khalil, Kretzmer and Yalden.

[19] See communication No. 558/1993, *Canepa* v. *Canada*, Views adopted on 3 April 1997, para. 11.4.

[20] See *Madafferi* v. *Australia*, para. 9.8.

siblings in Australia, or to reside with both parents (or the entire family) in the Islamic Republic of Iran if the family members so chose.

6.22 Even though the author contends that it would not be in the best interest of the minor child to live in the Islamic Republic of Iran in the event that the family decided (as they have done) that she should reside there, there is nothing to suggest that this would amount to a failure by the State party to provide her with the necessary measures of protection under article 24.

6.23 The State party notes that the remedies sought by the author are based on the same flawed legal and factual assumptions that it noted in its observations. The State party considers that fair hearing protections in this case were afforded to the extent required under article 13. With respect to the request to be provided with specific information as to the allegation of threat to national security, the State party notes that this directly seeks the divulgence of information the confidentiality of which has been found under Australian law to be necessary to protect national security. The State party also considers that remedies involving a change in legislation to avoid future violations are not adapted to individual communications.

Author's comments on the State party's observations

7.1 On 6 June 2011, the author noted that it remained unknown whether and to what extent probative evidence had been withheld from his legal representatives in the proceedings. The Committee does not, therefore, have the benefit of scrutinizing for itself any of the secret evidence withheld from the author personally. The State party has also not released any written records of any Australian Security Intelligence Organisation interviews with the author to evidence that it had informed him with any particularity of the nature of the allegations against him. As previously noted, the Federal Court itself did not independently test the evidence for its accuracy or reliability, determine for itself whether expulsion was necessary for security reasons, or determine for itself whether non-disclosure of certain evidence to the author was warranted or not. Rather, the Court was limited to a narrow review of the secret evidence on limited grounds of law, not fact; and it could not step into the shoes of the Australian Security Intelligence Organisation or the Department of Immigration and Citizenship to remake de novo the security assessment or the expulsion decision flowing from it.

7.2 As regards disclosure, the Federal Court did not assess whether non-disclosure to the author was required but rather focused on the more limited question of whether the Australian Security Intelligence Organisation Director General had given personal genuine consideration to disclosure. Moreover, the Federal Court conceded that it lacked expertise to adequately review security information, stating that "courts are ill-equipped to evaluate intelligence".

7.3 On article 2 read in conjunction with article 13, the author recalls the Committee's general comment No. 15 (1986) on the position of aliens under the Covenant, in which it is stated that article 13 applies equally to all aliens subject to expulsion proceedings and that discrimination may not be made between different categories of aliens in the application of article 13.[21] The State party differentiates between different categories of aliens in the provision of fair hearing rights concerning expulsion proceedings. The conferral of statutory rights upon some persons and their withholding from others is a deliberate signal by the legislature that there is a difference in the recognition, status and treatment afforded to those groups.

[21] General comment No. 15, para. 10.

7.4 There is a fundamental difference in the level of procedural protection accorded in respect of the different groups, depending on whether common law applies (as in the author's case) or the Australian Security Intelligence Organisation Act applies. At common law, the agency issuing the security assessment — the Australian Security Intelligence Organisation — is the same body that takes the decision to withhold the reasons, information and evidence supporting it from the person affected. In contrast, under the Australian Security Intelligence Organisation Act, the decision about non-disclosure is taken by a different actor, the Attorney General, from the body — the Australian Security Intelligence Organisation — that makes the security assessment. The former is an independent decision maker who is free to depart from a recommendation made by the Australian Security Intelligence Organisation. It is notable that common law rights are vulnerable to modification in the light of subsequent judicial decisions, whereas statutory rights can only be modified by a subsequent act of parliament.

7.5 On national origin, the overwhelming majority of persons comprising the group not entitled to statutory procedural fairness under the Australian Security Intelligence Organisation Act will possess a national origin that is foreign and not Australian. As for the "other status", the group in question is sufficiently distinctive and identifiable because of its lack of connection to the Australian community, arising from its migration status, compared with the greater bonds of attachment of the privileged group.

7.6 The author also disagrees that he has failed to exhaust domestic remedies concerning national origin discrimination. An action is only available under section 10 of the Racial Discrimination Act where a person of a "particular" national origin does not enjoy a right or enjoys a less extensive right than a person of another national origin. In contrast, articles 2 and 26 of the Covenant do not qualify or limit the protected ground of national origin by requiring the specification of a "particular" national origin group. Moreover, the author is no longer physically in Australia and can therefore not exhaust any other remedy.

7.7 With regard to article 13, the author considers that his case is distinguishable from the case of *Alzery* v. *Sweden* decided earlier by the Committee. In the latter case, there was evidence on the public record as to the person's involvement with an organized militant group, whereas no risks have been publicly disclosed in respect of the author and the basis of his security assessment cannot be surmised. The issue of disclosure is not explicitly addressed in article 13. The author contends that the separate requirement of expulsion "in accordance with law" includes an irreducible minimum disclosure of evidence to a person affected. That requirement is not subject to the national security exception in the second limb of article 13, although the degree of disclosure required already accommodates security concerns by only requiring a minimum level of disclosure while still protecting classified information.

7.8 In the present case, the State party has not in fact excluded any of the three enumerated procedural protections which are subject to the national security exception under the second limb of article 13. It necessarily follows that the State party cannot exclude the implied duty of disclosure. Otherwise, the enumerated protections of article 13, which the State party has not excluded in the author's case, become nothing more than a pretended protection, when in reality those protections are deprived of meaningful or effective content. In other words, it would be nonsensical to allow the author to challenge his expulsion and then have it reviewed by a merits tribunal and a court in circumstances where the person does not know the particulars or substance of the allegations against him. Where a State party does provide a person affected with an opportunity to submit reasons against his expulsion and to have the expulsion decision reviewed, the State party must provide sufficient disclosure to the person affected to render such a review effective and for it not to be a mere formality. In the alternative, if minimum requirements do not derive by implication from the three procedures enumerated in the second limb of article 13, then a

minimum disclosure is always required to ensure that an expulsion is made in accordance with law under the first limb of article 13.

7.9 Where adverse evidence against the author has not been disclosed to him, even in summary form, the Committee can have little confidence in the State party's assertion that it has not acted in bad faith or in an arbitrary fashion. In such circumstances, at the very least, the onus should shift to the State party to demonstrate, through the provision of evidence directly to the Committee (such as in closed session, or otherwise in confidence), that its decision is not in bad faith or an abuse of power. Otherwise, the Committee is left with an assertion by national institutions that they have not acted in bad faith or unreasonably, in circumstances where the affected person cannot participate in testing those assertions.

7.10 The expression "in accordance with law" in article 13 encompasses a number of elements: concordance with domestic law (substantive and procedural) and the Covenant; and wider notions of legality and due process of law. In communications to date, the Committee has not had to consider the latter meaning. Ambiguity in the expression can be resolved in part by reference to relevant supplementary materials, such as article 32 (2) of the 1951 Convention relating to the status of refugees and article 1 (1) of Protocol No. 7 to the European Convention on Human Rights. The former states, in its first limb, that "the expulsion of such a refugee", on national security or public order grounds, "shall only be in pursuance of a decision reached in accordance with due process of law". The notion of "in accordance with law" properly interpreted as "due process" of law accordingly requires that a person have knowledge of the case against them, which in turn requires the disclosure of sufficient particular information or evidence.

7.11 In *Ahani* v. *Canada*, the author was provided with a summary redacted for security concerns reasonably informing him of the claims made against him. Such disclosure was critical to the acceptance by the Committee that the procedure had complied with article 13. In the present case, this has not happened.[22] In addition, the Committee found, in the *Ahani* case, that the subsequent decision by the Canadian Minister of Citizenship and Immigration had been faulty, for unfairness, as the author had not been provided with the full materials on which the Minister had based his or her decision, nor with an opportunity to comment in writing thereon.[23]

7.12 In 2011, the Australian Human Rights Commission expressed concern about the lack of transparency surrounding security assessments issued by the Australian Security Intelligence Organisation, particularly the withholding of any statement setting out information that the Australian Security Intelligence Organisation relied upon in making decisions and the consequent inability to effectively contest adverse assessments.[24]

7.13 Given the absence of a fair hearing establishing by means of evidence that the author is a national security risk to Australia, the State party has not presented an adequate, objective justification for any interference in the author's family. The author also considers that the hardship inflicted upon the four innocent members of the family clearly outweighs the case for expulsion. Furthermore, the State party has not demonstrated that less invasive means of addressing any legitimate security concerns would be ineffective.

[22] See *Ahani* v. *Canada*, para. 10.5.

[23] Ibid., para. 10.6.

[24] Australian Human Rights Commission, "2011: Immigration detention at Villawood", p. 12.

Further submission from the State party

8.1 On 21 November 2013, the State party reiterated that the author could have brought a complaint for racial discrimination under section 10 of the Racial Discrimination Act, since the presence of the author overseas and the potential costs of litigation did not constitute sufficient grounds for exempting the author from exhausting domestic remedies.

8.2 In relation to the author's claim that the State party has not in fact excluded any of the three enumerated procedural protections which are subject to the national security exception under the second limb of article 13 (see para. 7.8 above), the State party replies that it has indeed, only to the extent strictly necessary for the protection of national security, limited enjoyment to the fullest possible extent by the author of his ability to submit reasons against his expulsion (because he did not have access to the specific reasons for the security assessment, which led to his expulsion, although his legal representatives at the time and the courts did). Further restricting his access to the procedural safeguards of article 13 would not have been necessary for compelling reasons of national security.

8.3 The State party challenges the author's mischaracterization of the State party's interpretation of the expression "in accordance with law", which suggests that it excludes "due process" requirements. The State party's view is that it refers to the domestic law of the State in question. In the Australian context, this comprises laws enacted by Parliament, and the common law, including those due process protections contained in both.

8.4 Nothing in the Committee's Views in *Ahani* v. *Canada* indicates a minimum procedural entitlement with respect to provision of information that cannot be excluded for compelling reasons of national security, or otherwise supports the conclusions claimed by the author.

8.5 With regard to the author's contention in which he contrasts statutory rights and common law rights, the State party notes that both decisions of the Director General of the Australian Security Intelligence Organisation and decisions of the Attorney General are reviewable by the Federal Court. This provides a judicial safeguard to address concerns related to independent oversight.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

9.2 As required under article 5 (para. 2 (a)) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's challenge to the admissibility of the author's allegations of discrimination, among other things for failure to exhaust domestic remedies. It notes in this respect the State party's arguments that the author could have brought a complaint for racial discrimination under section 10 of the Racial Discrimination Act. The Committee notes the argument of the author that he could not have recourse to such a remedy after his expulsion to the Islamic Republic of Iran. The Committee also notes the State party's counterargument that the presence of the author overseas and the potential costs of litigation do not constitute sufficient grounds for exempting the author from exhausting domestic remedies. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (para. 2 (b)) of the Optional Protocol, insofar as such remedies appear to be

effective in the given case and are de facto available to the author.[25] The Committee also recalls that mere doubts about the effectiveness of the remedies, or in this case about the relevance of such remedies, do not absolve an individual from exhausting available domestic remedies.[26] In the circumstances, the Committee concludes that it is precluded, under article 5 (para. 2 (b)) of the Optional Protocol, from considering the author's allegations under article 2 read in conjunction with article 13 on the one hand, and under article 26 on the other hand.

9.4 In the absence of any other challenges to the admissibility, the Committee declares the communication admissible insofar as it appears to raise issues under articles 13, 17, 23 and 24 of the Covenant, and proceeds to their consideration on the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (para. 1) of the Optional Protocol.

10.2 The Committee notes the author's allegation that the State party's refusal to grant the author a visa, which led to a duty to leave the country, constituted arbitrary interference with his family life under articles 17 and 23, and also violated his daughter's rights under article 24 as she was a minor at the time of departure and was not afforded the protection to which she was entitled under that provision. The Committee notes the State party's argument that the decision as to whether the family members would accompany the author to the Islamic Republic of Iran or remain in Australia is purely an issue for the family and the separation of the family members is not compelled by the State's action. The Committee also notes the State party's assertion that full consideration was given to the interest of the minor child in the decision leading to the author's departure but that compelling reasons of national security finally prevailed in the case.

10.3 The Committee recalls its jurisprudence that a State party's refusal to allow one member of a family to remain in its territory may involve interference in that person's family life.[27] In the present case, the author of the communication had been living with his family in Australia for 16 years without ever having been charged or warned by the domestic authorities with regard to his personal conduct. His two elder sons had been Australian citizens since 2003 and his youngest daughter had been born in Australia and attended Australian schools, developing social relationships there. Upon the author's request for a permanent visa, the State party decided not to grant it for what it considered to be "compelling reasons of national security", while it allowed the other family members to remain on its soil. Eventually, the author's wife decided not to be separated from her husband, they both decided that their minor daughter should stay with them and they departed from Australia on 27 June 2010, the author having been denied the right to stay. The Committee considers that a decision by the State party that involves the obligatory departure of a father of a family that includes a minor child, and that compels the family to choose whether they should accompany him or stay in the State party, is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes

[25] See, inter alia, communication No. 1959/2010, *Warsame* v. *Canada*, Views adopted on 21 July 2011, para. 7.4; and communication No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5.

[26] See communication No. 1584/2007, *Meng Qin Chen* v. *the Netherlands*, para. 6.2.

[27] See, inter alia, *Winata* v. *Australia*, para. 7.1; *Madafferi* v. *Australia*, para. 9.7; and *Warsame* v. *Canada*, para. 8.7.

to long-settled family life would follow in either case.[28] In the present circumstances, the Committee considers that the decision by the State party to refuse the author's request for a visa, which led to this situation, constitutes interference within the meaning of article 17 of the Covenant.

10.4 The Committee has to determine whether such interference with his family life is arbitrary or unlawful pursuant to article 17 (para. 1) of the Covenant. The Committee recalls that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law.[29] In the present case, the author had lived more than 16 years legally in the territory of the State party, apparently without any legal restrictions, when he had to leave, a fact that has not been refuted by the State party. The Committee considers that disrupting long-settled family life imposes an additional burden on the State party as far as the procedure leading to such disruption is concerned. The author was never formally provided with the reasons for the refusal to grant him the requested visa which resulted in his duty to leave the country, except for the general explanation that he was a threat to national security based on security assessments of which he did not even receive a summary. While his legal representatives were provided with information on the evidence held against him, they were prevented, by a decision by the judge, from communicating to the author any information that would permit him to instruct them in return and to refute the threat that he allegedly posed to national security.

10.5 In light of the author's 16 years of lawful residence and long-settled family life in Australia and the absence of any explanation from the State party as to the reasons for terminating his right to remain, except for the general assertion that it was done for "compelling reasons of national security", the Committee finds that the State party's procedure lacked due process of law. The State party has, therefore, not provided the author with an adequate and objective justification for the interference with his long-settled family life. In the specific circumstances, the Committee considers that the State party has violated the author's rights under article 17, read in conjunction with article 23, of the Covenant, and, as a result, has also violated the rights of his family under those provisions.

10.6 Having reached this conclusion, the Committee decides not to examine separately the remaining grounds invoked by the author under articles 13 and 24 of the Covenant.

11. The Human Rights Committee, acting under article 5 (para. 4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 17, read in conjunction with article 23, of the Covenant, with regard to the author and his family.

12. In accordance with article 2 (para. 3 (a)) of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including a meaningful opportunity to challenge the refusal to grant him a permanent visa; and compensation. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive

[28] See *Madafferi* v. *Australia*, para. 9.8.

[29] See, inter alia, communication No. 2009/2010, *Ilyasov* v. *Kazakhstan*, Views adopted on 23 July 2014, para. 7.4.

from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views and to have them disseminated widely.

Appendix

[Original: Spanish]

Partially dissenting opinion of Committee members Sarah Cleveland and Víctor Manuel Rodríguez-Rescia

1. The present opinion is consistent with the Human Rights Committee's finding, in its decision on communication No. 1937/2010, of a violation of the rights set forth in article 17, read in conjunction with article 23, of the Covenant, with respect to both the author and his family.

2. The present opinion does not, however, concur with paragraph 10.6 of the communication, which decides not to examine separately the author's other arguments under article 13 of the Covenant. On the contrary, we consider that the communication contains a solid basis for invoking the circumstances referred to in article 13, namely expulsion, by the State, of aliens who are lawfully in the country, on account of "compelling reasons of national security". As most of the State's arguments seek to justify the expulsion of the author by invoking "compelling reasons of national security", the communication should, as a matter of course, assess the applicability or non-applicability of article 13 of the Covenant.

3. We consider in this connection that the Committee should not have disregarded article 13 but rather should have studied whether, in the present communication, the article was applicable, and whether or not it had been violated, in line with the approach adopted in a previous case considered by the Committee (communication No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004).

4. As the Committee concluded in paragraph 10.4 of the present communication that "the author was never formally provided with the reasons for the refusal to grant him the requested visa which resulted in his duty to leave the country, except for the general explanation that he was a threat to national security based on security assessments of which he did not even receive a summary", we consider that the Committee should have assessed that circumstance and decided whether or not article 13 had been violated.

5. In the light of the foregoing, we take the view that the present communication does in fact comprise a violation of article 13 of the Covenant. Paragraph 10.6 should therefore be amended to read as follows: "10.6 The Committee notes that the invocation of 'compelling reasons of national security' to justify the expulsion of the author — under the circumstances of the present case — did not exempt the State from the obligation under article 13 to provide the requisite procedural safeguards. The fact that the State failed to provide the author with these procedural safeguards constitutes a breach of the obligation under article 13 to allow the author to submit the reasons against his expulsion, in light of the charges laid against him by the administrative authorities. This means that he should have been given the opportunity to comment on the information submitted to them, at least in summary form."